No. 310.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Illinois.

BRIEF FOR APPELLEE.

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INDEX.

CASES CITED.

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Statement of the Case.

This case is on appeal from a decree rendered by the District Court of the United States for the Eastern District of Illinois. By the decree appealed from the Interstate Commerce Commission was perpetually enjoined from taking any further steps toward awarding damages against appellee for an alleged failure to furnish coal cars to certain shippers. The proceedings involve the jurisdiction of the Interstate Commerce Commission to award damages for failing to furnish coal cars in the absence of any claim of discrimination or preferential treatment. In other words, this case presents sharply to this court the question of whether a shipper who has failed to receive cars when ordered may main-

tain a suit for damages before the Interstate Commerce Commission, it appearing that no administrative question whatever is involved.

The bill in this case, which was sustained by the decree appealed from, is an attack upon the soundness of the conclusions reached by the Interstate Commerce Commission in an opinion and report rendered in the case known as *Vulcan Coal & Mining Company* v. *Illinois Central Railroad Company*, decided by the Commission January 30, 1915, and reported in 33 I. C. C. Rep. 52.

It will, perhaps, aid in a clear understanding of the precise questions involved in this appeal to consider first the character of the complaint filed by the shipper with the Interstate Commerce Commission, since this complaint forms the basis of the proceedings before the Interstate Commerce Commission and gives color to all subsequent proceedings both before the Commission and before the court.

The record shows that there were filed with the Interstate Commerce Commission three certain petitions, one by the Vulcan Coal & Mining Company, one by the St. Louis-Coulterville Coal Company and one by the Groom Coal Company, identical in all their essential features. These complaints or petitions appear at pages 6 to 20, inclusive, of the transcript.

The gravamen of the complaint of the Vulcan Coal & Mining Company is contained in the fourth paragraph thereof. (Tr., 6.) This paragraph reads as follows:

> "That under the provisions of the Act to Regulate Commerce it became and was the duty of the said respondent to furnish this petitioner

with cars and other transportation facilities for the purpose of transporting to the markets the output of the mines of the said petitioner upon the reasonable requests of the said petitioner; and your petitioner further represents that during the said period of two years, this petitioner has operated its said mine, and from time to time during the periods as hereinafter set forth has requested from the said Illinois Central Railroad Company, respondent herein, cars and transportation for the purpose of transporting the output of the mines of this petitioner from Belleville, Illinois, to St. Louis, Missouri, and other interstate points, but that respondent failed in its duty in this regard in furnishing unto said petitioner the cars and transportation required by this petitioner and by it from said respondent requested at the various times during the said period of two years when the said cars and transportation were demanded and required, although this petitioner was able and ready, had such cars been furnished, to ship the full capacity of the mine."

Thereafter, the said petition sets out at considerable length the precise manner in which the petitioner was damaged, these damages being claimed not only by reason of loss on coal, which petitioner alleges that it would have shipped had it been furnished cars, but also loss due to the increased expense of mining coal resulting from a short car supply. Precisely this same averment occurs in the fourth paragraph of the petition filed by the St. Louis-Coulterville Coal Company (Tr., 11), and the fourth paragraph of the petition filed by the Groom Coal Company. (Tr., 16.) It will thus be seen that the petitioner in this quoted paragraph does not allege any discrimination in treatment, but depends solely upon the allegation that cars were requested in which to ship coal and that these cars were not

furnished, although the request was reasonable. The allegation in this petition filed with the Interstate Commerce Commission is not at all different from what one would expect to find in a declaration filed at law for damages resulting from a failure to furnish cars.

It is true that in the twelfth paragraph of the petition filed by the Vulcan Coal & Mining Company, and in similarly numbered paragraphs in the other petitions, there is an averment that the petitioner was discriminated against in the distribution of coal cars in violation of Section 3 of the Act to Regulate Commerce, in that certain mines in Kentucky were alleged to have received a greater share of cars than was given to petitioner's mines and in that certain mines in Illinois were favored by reason of the fact that the railroad company took the entire output of the mines and therefore, as alleged, claimed the right to furnish cars in greater quantities than were furnished to petitioner's mines.

At the outset, however, it should be stated that all these averments relating to discrimination were expressly abandoned by the petitioners at the hearing before the Interstate Commerce Commission, so that there remains in the case only the question raised by paragraph 4 of the petition, which, as stated, deals only with the failure of the railroad company to furnish cars. There can be no doubt that the allegations as to discrimination were abandoned and dismissed. This is expressly stated by the Interstate Commerce Commission in its opinion. Thus it is said in that opinion:

> "The complaints as originally drawn included a prayer for damages on account of the alleged

> failure of defendant to distribute its available equipment upon a non-discriminatory basis, but upon the argument the issues were narrowed to a consideration of the reasonableness of the car supply during the periods in question." (Tr., 21.)

Furthermore, it was alleged in the bill of complaint filed by appellee in the U. S. District Court as follows:

> "That at said argument before the said Commission it was expressly declared by counsel for each and all of the said complainants, to wit: the Vulcan Coal & Mining Company, the St. Louis-Coulterville Coal Company and the Groom Coal Company, that so much of the said complaints as charged any undue and unlawful discrimination on the part of petitioner in distributing coal cars was dismissed, and it was then and there expressly stipulated of record that the said complaints, and each of them, should be considered as so amended as to omit all charges of undue and unlawful discrimination; and, thereafter, the said causes proceeded upon the sole issue of damages for alleged failure to furnish cars upon demand." (Tr., 3.)

In the answer filed by the Interstate Commerce Commission, this ninth paragraph of the bill was denied (Tr., 49 and 50); but at the hearing, the allegations of the answer denying the averments of the petition in this respect were withdrawn, as appears from the recitals of the final decree. This recital is as follows:

> "Prior to the submission, the Interstate Commerce Commission by leave of court withdrew the denial in paragraph two of its answer of the allegations of paragraph nine of the petition." (Tr., 76.)

It thus appears that, by the action of the Interstate Commerce Commission in withdrawing its denial of

the averments of paragraph 9 of the original petition, these averments stood admitted at the trial, and the legal effect of this withdrawal is that it was admitted by the Government and by the Interstate Commerce Commission that on the argument before the Interstate Commerce Commission the petitions of all the complaining shippers were so amended as to dismiss all that part of their petitions which alleged discrimination or any discriminatory treatment in the distribution of cars. The case before the Interstate Commerce Commission therefore stands upon the averment above quoted from the petition to the effect that the shippers had coal which they desired to transport, asked for cars and were refused them. The case before the Commission amounts, therefore, to nothing more than a suit for damages for failing to furnish cars. It was so treated by the Interstate Commerce Commission as is shown by an examination of the lengthy opinion promulgated by the Commission upon the question of jurisdiction.

The report of the Interstate Commerce Commission and the bill filed in this case show that the defendant before the Commission, appellee here, made timely challenge of the jurisdiction of the Interstate Commerce Commission and contended before the Commission that there was no jurisdiction in that body to entertain this complaint and to award damages. It was there contended that any cause of action which the shipper might have for failing to furnish cars must be prosecuted in the courts and not before the Interstate Commerce Commission; that the Interstate Commerce Commission was an administrative body, created by Congress for the

purpose of handling intricate, technical and expert questions relating to rates and practices of carriers —questions which the courts were not so well qualified to handle as would be a body of experts qualified by experience to dispose of these intricate questions. It was further contended that only such questions could be submitted to the Interstate Commerce Commission and that the jurisdiction of the Commission could not be extended to all those numberless controversies between the carriers on the one hand and the shipping public on the other as involved no expert or administrative questions.

The opinion of the Commission makes reference to so much of Section 1 of the Act to Regulate Commerce, amended June 29, 1906, as provides:

> "The term 'transportation' shall include cars, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor."

Reference is made to Sections 8, 9 and 13 of the Act. The contentions of the appellee, defendant before the Commission, are noticed by the Commission, and there is a reference in the opinion to a large number of Interstate Commerce cases and to rulings of the Commission, wherein the Commission, prior to the amended act of June 29, 1906, had consistently denied any jurisdiction in controversies of this character. The Commission dealt with the question of whether its jurisdiction was exclusive, and also the question of whether it had jurisdiction concurrent with the courts in actions of this character. The Commission concludes, after reviewing a number of cases decided by this court, that the Commis-

sion and the courts, perhaps, have concurrent jurisdiction of actions for damages; but there is no satisfactory conclusion reached by the Commission upon this point. The Commission states:

> "A careful examination of the language used by the Supreme Court shows that it has nowhere declared that there can be no concurrent jurisdiction of the Commission and of the courts." (Tr., 33.)

The language used by the Commission would indicate that it did not agree with the view that there could be no concurrent jurisdiction, but, as stated, there is no satisfactory conclusion on this point. The Commission, however, plants itself with some confidence upon the view that it had exclusive jurisdiction in this matter, basing its opinion largely upon the amendment of June 29, 1906, and upon the decision of this court in

> *C., R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426.

The Commission therefore concluded that it had jurisdiction, and proceeded to consider the question of whether the defendant, appellee here, had failed in its duty to provide cars upon reasonable request. The evidence upon this point was considered, certain excuses offered by the carrier were reviewed, and it was finally determined that the carrier had failed in its duty, this conclusion being expressed in the following language:

> "While the testimony offered by defendant explains to some extent its failure to furnish cars during the period specified, it does not in our opinion present a complete excuse. It may safely be said that at least in so far as the car supply upon the St. Louis Division is concerned, defendant did not at all times meet the requirements of the act. The figures submitted by de-

> fendant's general superintendent of transportation show that during certain months of the car shortage periods, the car supply on the St. Louis Division was as low as 33 per cent. of the cars demanded. However, from this it does not follow that complainants were damaged by the carrier even though the car supply for the entire division upon which their mines are located was inadequate. The supply at their particular mines might have been adequate to meet all reasonable demands which they were in a position to make." (Tr., 40.)

The Commission, therefore, concluded that there should be another hearing upon the question of the amount of damages, if any, sustained by the complaining shippers. There was a dissenting opinion, concurred in by Commissioners Clark, Harlan and Clements, in which the dissenting commissioners pointed out the fact that the Interstate Commerce Commission had never assumed jurisdiction in cases of this character, nor were they able to find that any jurisdiction existed in the Commission in this case. The gist of this dissent is expressed in the following sentence:

> "In the original act, as well as in amendments thereto, which have broadened, extended and strengthened the Commission's jurisdiction and powers, the Congress has carefully refrained from transferring to or conferring upon the Commission any jurisdiction or power which properly belongs to the judicial branch of the Government." (Tr., 43.)

Shortly after the rendition of this opinion, this court decided two cases, which absolutely destroyed the contention of the Commission that it had exclu-

sive jurisdiction in cases of this character. These cases are

Pennsylvania R. R. Co. v. *Puritan Coal Mining Co.*, 237 U. S. 121;

Illinois Central R. R. Co. v. *Mulberry Hill Coal Co.*, 238 U. S. 275.

In these cases it was settled that the shippers who were damaged by the failure of a carrier to furnish cars could resort to the courts in the first place and recover damages upon a proper showing, without having first submitted the matter to the Interstate Commerce Commission.

Upon the decision of these cases by this court, appellee, as shown by the bill, filed its petition before the Interstate Commerce Commission, calling attention to the decision of these cases and asking for a rehearing. The petition for a rehearing was, however, overruled. (Tr., 4.) Thereafter, the Interstate Commerce Commission made an order which was in the following words and figures:

"No. 6128

Vulcan Coal & Mining Company v. *Illinois Central Railroad Company.*

No. 6128 Sub No. 1

St. Louis-Coulterville Coal Company v. *Illinois Central Railroad Company.*

No. 6128 Sub No. 2

Groom Coal Company v. *Illinois Central Railroad Company.*

The above entitled cases are assigned for hearing October 1, 1915, 10 o'clock a. m., at Hotel Jefferson, St. Louis, Missouri, before Examiner Wilson.

By the Commission:

(Signed) GEORGE B. MCGINTY,
Secretary."

By this order the Commission proposed to have a further hearing at St. Louis, at the time indicated in the order, wherein the Commission's representatives would receive testimony as to the amount of damages with a view to having an order of reparation entered against appellee assessing such damages. Upon the service of notice of this order upon the appellee, it filed its original bill or petition in equity in the District Court of the United States for the Eastern District of Illinois, asking that this said order be canceled and set aside, and that the Interstate Commerce Commission be enjoined from further proceeding in the matter of awarding damages against appellee. The proceeding was under the provisions of the Act of Congress approved October 22, 1913, conferring upon the district courts of the United States jurisdiction theretofore exercised by the Commerce Court.

Upon the filing of the petition, the regular judge of the Eastern District of Illinois called in two other judges, one of whom was a circuit judge, and fixed a time for hearing the application for a temporary injunction. Notice was given, as the act requires, to the United States and to the Interstate Commerce Commission, and the Interstate Commerce Commission intervened regularly and filed its motion to dismiss and its answer. The United States filed a motion to dismiss. (Tr., 46.) The motion of the United States was overruled, and the case thereupon came on to be heard upon the bill and answer of the Interstate Commerce Commission, and, after hearing, a temporary injunction was granted, restraining and enjoining the Interstate Commerce Commission from further proceeding

with the hearings on the three complaints before it and staying any further action by the Interstate Commerce Commission. By agreement of the parties, the cause was thereupon submitted on final hearing and a final decree was rendered, making the temporary injunction perpetual and perpetually restraining the Interstate Commerce Commission from taking any further action in the matter and cancelling the order which the Commission had entered providing for a further hearing on the matter of damages. (Tr., 76.) From this final decree the United States and the Interstate Commerce Commission have prosecuted this appeal.

The Commission without jurisdiction.

The principal question here is as to whether the Interstate Commerce Commission has jurisdiction to award damages for failing to furnish cars. This was the only issue submitted to the Commission and the only issue decided by the Commission.

As stated in the preliminary part of this brief, all questions of discrimination were expressly dismissed and withdrawn from the Commision's consideration. The court is confronted with the necessity of deciding the simple question of whether a shipper who has failed to receive the cars which he demanded may bring an action before the Interstate Commerce Commission, seeking to recover damages therefor. It seems to be conceded in the opinion that prior to the amendment of June 29, 1906, the Commission had consistently held that it had no such jurisdiction. It was thought, however, by the Commission that the amendment referred to, which made

it the duty of the railroad company to furnish cars upon request, so broadened the jurisdiction of the Commission as to make it within the power of the Commission to police and supervise this duty, and that as a necessary consequence thereof, it had power to assess damages for a failure on the part of the carrier to perform a duty enjoined upon it by the act.

It will at once be seen that the question here is practically the same in principle as the one decided by this court in the very recent case of

> *United States and Interstate Commerce Commission* v. *Pennsylvania Railroad Company*, 242 U. S. 208,

appealed from the District Court of the United States for the Western District of Pennsylvania, decided December 11, 1916, and which for convenience may be referred to as the Tank Car Case. In that case, which will be considered a little later more in detail, this court held that the Commission was without jurisdiction to require carriers to supply tank cars to shippers upon demand. That case set aside an order of the Interstate Commerce Commission requiring the Pennsylvania Railroad Company to provide and furnish tank cars in sufficient numbers to take care of the shipments of persons desiring to use them. It is interesting to compare the decision of the Interstate Commerce Commission in the instant case with the decision of the Commission in the Tank Car Case. Such a comparison leads inevitably to the conclusion that the Commission decided the two cases upon identically the same theory and for practically the same reasons. The Tank Car

decision of the Commission is reported under the style of

Pennsylvania Paraffine Works v. *Pennsylvania R. R. Co.*, 34 I. C. C. 179.

It will be seen that the decision of the Commission in the instant case preceded the decision of the Commission in the Tank Car Case, although the Tank Car Case reached this court in advance of the instant case. It is interesting to compare the two decisions of the Commission in respect to the question of jurisdiction.

In the Tank Car Case, just as in the instant case, the jurisdiction of the Commission was sharply challenged by the carriers interested. The first headnote of the syllabus in the Tank Car Case reads thus:

> "The Commission has the power to require carriers to furnish all necessary equipment, both ordinary and special, upon reasonable request. *Vulcan Coal & Mining Company* v. *Illinois Central R. R. Co.*, 33 I. C. C. 52."

The Commission in the Tank Car Case, after stating the facts, refers to the amendment of 1906, quotes that amendment, refers to Section 12 and Section 15 of the act, and finally uses this language:

> "The question of the Commission's jurisdiction under the amended law was not brought before us until very recently. In *Vulcan Coal & Mining Company* v. *Illinois Central R. R. Co.*, 33 I. C. C. 52, we were asked to award damages due to a carrier's alleged failure to supply cars to certain coal mines upon reasonable request. The defendant in that case also denied the Commission's jurisdiction. We held that the question presented was properly before us on the ground that the determination of damages necessitated the prior determination of the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon

> reasonable request therefor, which we held to be an administrative question of which the Commission alone can take original jurisdiction." (See page 185 of the opinion of the Commission in the Tank Car Case.)

Again, on page 191 of the opinion of the Commission in the Tank Car Case, there is an extended quotation from the opinion of the Commission in the instant case. The opinions in the two cases were by the same commissioner, and it will be noted that the same commissioners dissented in both cases. In the dissenting opinion, written by Commissioner Clark in the Tank Car Case, this language is used:

> "The majority report in the instant case reasserts the possession by the Commission of powers that were asserted in the majority report in *Vulcan Coal & Mining Co.* v. *I. C. R. R. Co.*, 33 I. C. C. 52. If the act confers upon the Commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the Commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts and not in the Commission. For the reasons that were more fully stated in the dissent in the *Vulcan Coal & Mining Co. case, supra*, I am not able to accept the views of the majority on this point." (See page 195 of the opinion in the Tank Car Case.)

It will thus be seen that the assertion of the Commission's jurisdiction in the instant case rests essentially upon the same considerations that moved the majority of the Commission to assert jurisdiction in the Tank Car Case. This fundamental consideration was that, although it be conceded that the

Commission had no jurisdiction in the general field of giving remedies for failing to furnish equipment prior to the Amendment of 1906, it had jurisdiction in that field subsequent to the Amendment of 1906, since this amendment dealt with the subject of furnishing cars, and since the Commission was charged with the general duty of enforcing all the provisions of the act. When the relation, if not the identity, of the two cases is considered, it would, perhaps, be sufficient to say that, since this court has held that the Commission had no jurisdiction in the Tank Car Case, it must certainly follow that it had no jurisdiction in the instant case. This must be so, since this court has held that the Amendment of 1906 conferred no additional power upon the Commission, but merely defined and clarified the common law duty of the carriers in the matter of furnishing cars.

If the jurisdiction of the Commission was not increased by the Amendment of 1906 in the matter of special equipment, certainly it could not be increased in a case dealing with the general equipment of the carrier. As a matter of fact, coal cars fall into the class of special equipment. It is a matter of common knowledge that they are of peculiar type and construction, specially adapted to the transportation of coal. They cannot be used for a commodity which is injured by exposure to the weather. They are constructed in a way which will permit economical loading at the tipple of a mine and economical unloading by the consumer. They are, therefore, as much entitled to be classed as special equipment as a tank car. But, aside from that, there can be no serious contention here that,

prior to the Amendment of 1906, the Commission ever asserted any jurisdiction to award damages for failing to furnish cars. So much is practically conceded by the Interstate Commerce Commission in its opinion.

A short review of the decisions and administrative rulings of the Commission will show that the assertion of jurisdiction in a case like the one here under consideration was never attempted by the Commission prior to the Amendment of 1906.

In

New Orleans Cotton Exchange v. *I. C. R. R. Co.*, 3 I. C. Rep. 534,

a complaint was made against the practice of a carrier in permitting cotton to be moved in flat cars. The Commission held that it could not make an order of the kind desired, saying, in effect, that this was a matter pertaining to the physical operation of the railroad, with which the Commission could not interfere.

In

Loud v. *South Carolina Ry. Co.*, 4 I. C. Rep. 205,

complaint was made that the railroads had not furnished in every case special trains for the handling of melon traffic. The Commission uses this language:

> "The defendants furnish special trains for the melon traffic, and undertake to make quick movement and speedy delivery. It appears that in numerous instances they have, from some cause not stated, failed in this respect to the damage of the shipper. This failure, when avoidable by the exercise of reasonable diligence on their part, would seem to constitute a ground of action for damages in the courts. * * * It

> would seem, therefore, to be to the interest of the shipper not to seek a reduction of rates on the ground of a failure of duty on the part of the carrier, but to endeavor to enforce that duty by proper proceedings in the courts."

In

Duncan v. *A., T. & S. F. Ry. Co. et al.*, 6 I. C. Rep. 85,

a complaint was made to the Commission, seeking an award of reparation based on damage to goods in transit. The court, however, denied the request for reparation, using this language:

> "Therefore, in this case, also, the damage complained of cannot be made the basis of an order of reparation as being 'in consequence of any violation of the Act.' The remedy of a party for injury to goods shipped resulting from delay in transit, detention, loss, breakage, rotting or other deterioration or damage not attributable to a violation of any provision of the Act, is by proper action in the courts."

In

Jones et al. v. *St. L. & S. F. Ry. Co.*, 12 I. C. Rep. 144,

the Commission declined to make an order with reference to the location of station facilities, holding that this was a matter which would have to be settled in the courts.

In

Blume & Co. v. *Wells Fargo Co.*, 15 I. C. C. 53,

the only question involved was the Commission's jurisdiction to award damages for failing to make prompt delivery of fruit at an unloading station. It was alleged that, on account of the failure of the carrier to make such delivery, the benefit of a high market was lost and lower prices obtained than

would have been secured if delivery had been prompt. The Commission carefully considered the question of its jurisdiction, using this significant language:

> "Is it competent for the Commission to act upon a complaint of this nature and to award damages of this character? We have not so understood our authority under the amended Act to Regulate Commerce. The general purpose of the act, as is fully revealed in its first five sections, was to secure just and reasonable rates; to prohibit unjust and discriminatory rates in the performance by carriers of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences; to forbid a higher charge for a shorter than for a longer haul; and to render unlawful all combinations among carriers for the pooling of freights. In a word, as a regulative measure, the act confers upon the Commission power and authority to enter orders only with respect to the rates and practices of carriers, and that this was its general object appears no less clearly from an analysis of the statute itself than from the public discussion that accompanied its enactment. It was not intended by the Congress that the Commission should supplant and take the place of the courts with respect to that large class of complaints that may arise out of the failure of carriers to carry out their contracts of transportation promptly and safely, and properly to perform their duties as common carriers in the handling of shipments entrusted to them for carriage from one point to another. As to all such claims, as we have had occasion frequently to say in connection with informal complaints of this character, the Commission is without authority to afford redress.
>
> It is true that the act authorizes the Commission after full hearing and upon complaint made to award damage, but it is careful to restrict

that authority to cases in which the carrier may be liable under the provisions of the act. The express language of Section 8 is that in case of the commission or omission by the carrier of any matter or thing prohibited or required by the act, 'such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.' In Section 9 the provision is that the person injured 'may bring suit * * * for the recovery of the damages for which such common carrier may be liable under the provisions of this act.' In Section 16 the Commission is authorized to make an award of damages whenever, after hearing and upon complaint made it shall find that the party complainant 'is entitled to an award of damages under the provisions of this act for a violation thereof.' It is a violation of the provisions of the act for a common carrier to demand and collect an unlawful or discriminatory rate, and of complaints based on such violations the Commission has full jurisdiction and may afford redress by establishing reasonable rates to govern future shipments and awarding reparation with respect to past shipments. The Commission may also require carriers to desist from unlawful preferences and otherwise regulate the rates and practices of carriers; but with respect to the performance by carriers for the shipping public of their general duties as common carriers other than those covered by the act, the Commission is wholly without authority. Breaches of duty in that respect, such as the loss of or damage to property in transit, the failure to make delivery safely and with reasonable despatch in accordance with the contract, express or implied, which a carrier enters into when accepting a shipment for carriage, are matters that are solely within the jurisdiction of the courts. The complaint here is of such a character. The damages alleged to

> have been sustained by the complainants did not arise out of the breach of any duty or obligation resting upon the defendant under the terms of the Act to Regulate Commerce, but out of the breach of a duty imposed upon it by the common law promptly to deliver at a designated point a shipment which it had accepted and agreed to deliver at that point. The only recourse that shippers have with respect to such claims for damages is in the courts."

There can be no doubt that this is a clear denial of the right of the Commission to award such damages as were sought in the present case. The only difference is that in the instant case damages are sought for failing to receive goods, or, what is the same thing in effect, to furnish cars to transport them, and in the case just quoted from the damages sought were for failing to deliver goods. The principle is the same.

In

Royal Brg. Co. v. *Adams Express Co.*, 15 I. C. C. 255,

the Commission refused to make an order requiring express companies to accept C. O. D. shipments of intoxicating liquors. The Chairman of the Commission, in the opinion, states:

> "It seems obvious that the question must be decided by the Commission under this section (Section 3), for it is without authority to enforce compliance by carriers with any duties except those prescribed by the act; for the enforcement of duties not so prescribed the appropriate remedy must be sought in the courts."

In

Joynes v. *Penn. R. R. Co.*, 17 I. C. C. Rep. 361,

the Commission held that it had no jurisdiction to

award general damages on perishable freight which the shipper had been unable to unload, due to the fact that cars were not placed by the carrier at an accessible point. The opinion of the Commission reviews a great many authorities on the subject and concludes that the Commission is without power to make an award of general damages of this kind. After reaffirming its jurisdiction to pass upon questions of discrimination, the Commission uses this language:

> "We are also asked to ascertain and put a value upon the loss of trade alleged to have been suffered by him in consequence of his inability to deliver the fruit promptly to the customers who had purchased it. In other cases we have been asked to award damages to complainants, based on the market value of various commodities; to ascertain the amount of the depreciation of an elevator plant; to value the loss of the good will of a business concern resulting, as alleged, from the wrongful acts of the carrier; in another case we were asked to assess damages alleged to have been suffered by a complainant for the shrinkage and loss in weight of his hogs in transit, due to the refusal of a carrier to furnish double-deck cars.
>
> All those claims were based upon the theory that the damages alleged arose out of a violation of some provision of the Act to Regulate Commerce as amended. The various classes of claims that can and constantly do arise out of the negligent omission of carriers to do what they ought to do for shippers, or their negligence in doing what ought not to be done, are too varied to make it possible to attempt here to enumerate them. As to such matters the members of this Commission have no expert knowledge or any opportunity to acquire it. The capacity to deal as experts with the large variety of questions that such claims present is of course not easily attainable. Each such case

would depend upon its own peculiar facts. There is no good reason, therefore, for indulging the thought that the judgment of this Commission with respect to questions of that general nature would be any wiser or sounder than the opinion of a jury." (See pages 365 and 366 of the opinion.)

In

Hillsdale Coal & Coke Co. v. *Penn. R. R. Co.*, 19 I. C. C. 356,

the doctrine of the Joynes case was carefully and exhaustively reconsidered and adhered to.

In

Buffalo Hardwood Lbr. Co. v. *B. & O. S. W. R. R. Co.*, 21 I. C. C. 536,

it was held that the Commission would not award damages for injury to lumber shipped in open cars, although the complaint alleged, and the facts showed, that closed cars had been demanded and refused by the carrier. These cases, and others which are referred to in the opinion of the Commission, are produced here for the purpose of showing that in all cases of this character which were submitted to the Commission and decided prior to the Amendment of 1906, the Commission consistently refused to take jurisdiction upon the ground that questions of this character were for the courts and not for the Commission.

It will readily be seen that the question here involved is precisely the same in principle as the question submitted to the Commission in the cases cited. Here we have an instance of a shipper who complains that he has been damaged because the carrier did not furnish cars upon demand. As stated in an earlier part of this brief, the damages alleged are

that, by reason of the failure of the carrier to furnish cars, not so much coal could be mined and shipped as if there had been an abundant supply; and, further, that as to such coal as was mined and shipped, its cost was greatly enhanced by reason of the fact that the mine could not run at full capacity, owing to a scarcity of cars. Now, manifestly, the damages demanded are general damages such as a court is entirely competent and qualified to assess. Such damages are not different in principle from damages resulting from a failure to deliver shipments, damages due to injury in transit, and other damages growing out of a failure of the carrier to perform its common law obligation in the operation of the railroad. As to such damages, the Commission declined jurisdiction up to the time that the instant case was decided.

Indeed, the principle which underlies the decision of the Commission in

Scofield et al. v. *L. S. & M. S. R. R. Co.*, 2 I. C. C. Rep. 90,

in which the Commission held that it had no jurisdiction in the matter of tank cars, applies just as forcefully to condemn the jurisdiction sought to be exercised by the Commission here. This Scofield case is the one referred to in the opinion of this court in the Tank Car Case. In that case the Interstate Commerce Commission based its refusal of jurisdiction not only upon the ground of the special character of tank car equipment, but upon the broader and more general view that the Commission was without jurisdiction in any matter relating to the furnishing of cars. The opinion, which has in all essential respects been approved by this court,

goes upon the theory that the Commission does not exist for the purpose of enforcing all the common law duties of carriers, but exists for the purpose of regulating rates and prohibiting unlawful discriminations. The Commission uses this language in disposing of the contention that it has power over the instrumentalities of a carrier:

> "The law-making power has not taken upon itself the responsibility, nor has it clothed the Interstate Commerce Commission with the power and the responsibility, of directing a carrier to supply itself with any particular equipment or cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom alone it rightfully belongs, and if the carrier fails to do this in such a manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such failure." (See page 118 of the Commission's opinion.)

Again, the Commission says in this Scofield opinion:

> "The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings." (See page 117 of the Commission's opinion.)

In the instant case, as in the Tank Car Case, a majority of the Commission assumed jurisdiction over the equipment of the carrier upon the view that the amendment of June 29, 1906, had so broadened the provisions of the act as to make obsolete all prior decisions of the Commission upon this

question. We say, therefore, that the decision of this court in the Tank Car Case is determinative of the case before us. In that case the Commission was held to be without jurisdiction for the reason that the amendment of June 29, 1906, had not broadened the Commission's jurisdiction. The same result must follow here. Let us look at this Tank Car decision a little more closely to see whether the principles there announced do not control the instant case.

This case dealt, of course, with special equipment, to-wit: tank cars, in which there could be transported no commodity except liquids. The decision, however, denying the authority of the Commission, rests upon grounds which apply equally well to any proceeding before the Commission relative to furnishing cars. It is, of course, clear that the authority of the Commission to award reparation rests upon its assumed authority to regulate the supply of cars. It is not pretended by the Commission that it would have jurisdiction to award damages for failing to furnish cars, except upon the theory that all questions relating to car supply have been placed under the jurisdiction of the Commission by the express provisions of the Act to Regulate Commerce. In the Tank Car Case it is stated by the court:

> "In other words, the main question presented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty."

That is precisely the question here. The complainant before the Commission contended that it

was within the power of the Commission to enforce the carrier's duty to furnish cars by awarding damages for failing to do so. This court in the Tank Car Case reviews the opinions of the Commission prior to the rendition of its decision in that case, and, among other cases, refers at length to the Scofield case, *supra*, and reaches the conclusion that the Commission had consistently held that it had no jurisdiction in such matters prior to the amendment of June 29, 1916. The court summarizes the earlier view of the Commission thus:

> "This, then, was the view of the Interstate Commerce Commission of the duty of carriers and of its power over them; that is, that it was the duty of carriers to provide and furnish equipment for transportation of commodities and that this duty might expand with time and conditions, the special car becoming the common car and the shipper's right to demand it receiving the sanction of law. But the Commission decided it was the sanction of the common law, not of the statute, and that the remedy was in the courts, not in the Commission."

The court then reviews at length the history of the amendment of June 29, 1906, and shows that this amendment was adopted largely on account of the recommendation of the Commission and with a view to placing under the jurisdiction of the Commission such special services as refrigeration and the care of property in transit. The court upon a careful analysis of the original act and of the amended act found that the amended act had no effect to enlarge the Commission's authority in the matter of furnishing cars, but that both the original act and the amended act did no more than to announce the common law duty of the carrier. There is, of course,

the necessary inference that such common law obligations are to be enforced in the courts and not in the Commission. The court deals particularly with so much of Section 12 of the Interstate Commerce Act as provides:

> "And the Commission is hereby authorized and required to execute and enforce the provisions of this act."

Referring to this language of the act, the court says:

> "But this casts us back to our general considerations, to which we may only add that there was no question of the duty of carriers either under the act of 1887 or under the amendment of 1906. It was their duty under both to furnish instrumentalities of transportation. The question is—whether under the latter as under the former jurisdiction to enforce the duty was at common law in the court, or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts and that the amendment of 1906 was not intended to, and did not, change the remedy. *In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions.*" (Italics ours).

This is the heart and core of the whole matter. The Commission had steadfastly and consistently denied jurisdiction up to the time the amendment of 1906 was enacted. It denied jurisdiction to award damages for failing to furnish cars just as certainly as it denied jurisdiction in the matter of special tank car equipment. We are, therefore, here privileged to say in the language of this court that, when Congress amended the act in 1906, it accepted the view of the Commission as to its lack of jurisdiction and approved its decisions on this subject. The court in

the Tank Car case goes into an exhaustive discussion of the meaning of the word "practices", as used in Section 15 of the act, and holds that this word is not sufficiently broad and comprehensive to effect a change in the Commission's jurisdiction.

Reference is made in the opinion to the fact that three commissioners dissented from the view of the Commission as to its jurisdiction, and the theory of these dissenting commissioners was practically adopted by the court as sound.

We have shown that the dissenting commissioners in the Tank Car case were the same as dissented in the instant case; that the instant case furnishes in reality a more extended statement of the reasons that governed the action of these dissenting commissioners than does the dissent in the Tank Car Case.

The court rejects the view that the Commission can have jurisdiction in the matter of equipment, using this language:

> "It is difficult to particularize all that the ruling of the Commission implies of power. What of omission or commission in the carrier's relation to the public may not be said to be a practice or practices in the broad sense attempted to be given to those words? A railroad's powers are its duties, bearing, of course, obligations; and all of them by the asserted construction are swept under the jurisdiction of the Commission—so swept by a single word, not of itself apposite, and determined besides by its association against the contention. This was apparent to the dissenting commissioners and repelled their concurrence. Well might they have recoiled from going to such extreme and doubtful implication and have been impelled to declare as they did declare that if such power

> was given it logically and necessarily extended to every facility of transportation."

If there be the slightest doubt of the authoritative character of this decision, this would be dispelled by the statement in the opinion that the Commission's decision rests upon the fundamental proposition that it is the duty of the railroad to furnish equipment for the transportation of products and that the Commission has the jurisdiction to enforce that duty. The court declines to go into the facts of these propositions manifestly upon the view that, though it be conceded to be the duty of a railroad to furnish equipment, it by no means follows that it is the function of the Commission to enforce such a duty.

The court says:

> "We need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment, or how much the decisions were based upon the belief of the shipper, justified or encouraged by the railroads, that the equipment required would be furnished."

The court, however, does consider the second proposition, that is to say, the proposition that it is within the Commission's power to enforce the duty to furnish equipment, and holds squarely as to all equipment that such is not within the power of the Commission. The cases which will be found in the opinion of the Commission in the instant case are reviewed and it is pointed out by the court that none of them has the effect of giving to the Commission the authority claimed.

We say, therefore, that the opinion in the Tank Car case is conclusive against the view that the Com-

mission has jurisdiction here. It will not do to say, as the Commission's opinion intimates, that it is within the power of the Commission to determine whether a carrier has or has not supplied itself with a reasonable number of cars. The Commission in its opinion in the instant case states that the issue is as to the reasonableness of the car supply. There is some effort to show that this question is an administrative question committed to the jurisdiction of the Commission. It may be sufficient to say in this connection that the petition filed with the Commission by the shipper in no way raised any issue as to the reasonableness of the railroad's car supply. As heretofore stated, the gist of this complaint is in the fourth section of the petition (Tr., 6). This paragraph contains no reference to the question of whether there was a reasonable car supply or whether the carrier had supplied itself with sufficient cars to take care of the business offered it. The petition recites that it was the duty of the respondent to furnish petitioner with cars upon reasonable request; that the petitioner operated a mine on the line of the Illinois Central, and from time to time requested cars and transportation so that it might move its coal, but that respondent failed in its duty in regard to furnishing these cars so requested, although the petitioner was able to ship coal if cars had been furnished. There is here not the slightest suggestion that the sufficiency of the carrier's car supply was challenged. We say, therefore, that the Commission had no warrant to state, as it does in the opinion, that the question involved was the sufficiency of the carrier's general coal car supply.

If, however, we are mistaken in our contention that

the instant case is ruled by the Tank Car decision in this court, it would seem to be clear upon authority that nothing in the Act to Regulate Commerce gives jurisdiction to the Commission in this matter. The Commission seems to have based its opinion largely upon the contention that it (the Commission) had exclusive jurisdiction of the controversy under the authority of numerous cases decided by this court, the effect of which is to hold that as to all administrative questions the Commission must first be consulted before the courts can offer any redress (*Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426; *B. & O. Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S., 481; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S., 506; *United States* v. *Pacific & Arctic Ry. Co.*, 228 U. S., 87; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S., 247). But the view that the Commission has exclusive jurisdiction in a suit by a shipper for failing to furnish cars where there is no question of discrimination has been completely destroyed by decisions of this court. We need do no more than mention them in the briefest possible manner.

One of these is

Pennsylvania R. R. Co. v. *Puritan Coal Mining Co.*, 237 U. S. 121.

In that case there was a suit in the state court for failing to furnish cars in accordance with the railroad company's own rule. It was contended that the suit could not be maintained in the absence of a ruling by the Commission, or, if it could be maintained in the court at all, it must be in the Federal Court. This court upheld the action of the Supreme

Court of Pennsylvania awarding damages, saying, among other things:

> "Construing, therefore, Sections 8, 9 and 22 in connection with the statute as a whole, it appears that the act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of the state courts in any case, new or old, where the decision did not involve the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive."

Again, it is said in this opinion:

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in section 9."

Again, it is said in the opinion:

> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts."

Again, it is said in the opinion:

> "The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a manufacturing plant, instead of to the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or, if by reason of a negligent mistake they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars, so that, if we ignore the plaintiff's characterization of the defendant's conduct, and consider the nature of the care, alleged in the first count and established by the evidence, it will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact."

Another case along this line is:

> *Illinois Central Railroad Company* v. *Mulberry Hill Coal Company*, 238 U. S., 275

That was a suit against the carrier for failing to furnish cars for interstate shipments, as required by an Illinois statute. The point was made that the suit could not be maintained in the absence of a decision by the Interstate Commerce Commission. The court, however, followed the decision of the Puritan case, saying that, while the Puritan case arose before the amendment of 1906 to the act, yet there was nothing in the amendment which would affect the jurisdiction of the court.

Another case of the same character is:

Eastern Railway of New Mexico v. *Littlefield*, 237 U. S., 140.

That was a suit for failing to furnish cars for the transportation of cattle, and the court held that, following the decision in the Puritan Coal Mining Company case, *supra*, jurisdiction lay in the courts to recover damages for failing to furnish the cars.

And, finally, this court has reaffirmed and amplified this view in

Pennsylvania R. R. Co., v. *Sonman Shaft Coal Co.*, 242 U. S., 120, decided at this term. The court in that case held that, in a suit for failing to furnish coal cars, jurisdiction lay in the State courts, where no administrative question was involved, saying:

> "And that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a Federal or a State court without any preliminary finding by the Commissoin, and this whether the carrier's default was a violation of its common law duty

existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act."

It will thus be seen that nothing remains of the Commission's theory that the present case presents an instance where there is any occasion for the exercise of the Commission's administrative power. Certain it is that the Commission was in error in holding that its jurisdiction was exclusive in this matter.

The question of concurrent jurisdiction.

We come then to the question of whether the Commission has jurisdiction concurrent with the courts. It may not be altogether profitable to argue this phase of the case, since, as we have seen, this court has in effect decided in the Tank Car Case that the Commission has no jurisdiction whatever to compel the observance by the carriers of its ordinary, common law duties, and has held further that the obligation to furnish cars is such a common law duty, lying entirely outside of the scope of the Commission's activities. We will, however, state in the briefest manner consistent with clearness what we conceive to be the true rule on the subject of the Commission's concurrent jurisdiction.

Our contention in this respect amounts to no more than the assertion that the Interstate Commerce Commission has no jurisdiction of any disputed controversy which involves no administrative question. This may be so obvious a proposition that a mere statement of it carries with it irrefutably a conviction of its entire correctness. It would seem that such was the view of this court when it considered the Tank Car Case, for in the opinion of the court

in that case it seemed to have been taken for granted that, if the question was not an administrative one, the Commission would have no jurisdiction.

It was urged by the appellant in the Tank Car case that certain decisions of this court, to-wit: *L. & N. R. R. Co.* v. *Cook Brg. Co.*, 223 U. S., 70; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S., 140; *Pennsylvania Railroad Company* v. *Puritan Coal Mining Company, supra; Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co., supra*, compelled the conclusion that the question was not administrative. The court found it unnecessary to pass directly upon this question, but intimated that the point urged by appellant was a very serious one.

It may be said, before undertaking to state precisely what we understand to be the true rule, that, even if the Commission has jurisdiction over controversies which present no administrative questions, it would seem under the decision of the Tank Car Case not to have jurisdiction over this particular question. Manifestly, the Commission has no jurisdiction in questions which are not administrative, unless those questions arise under the Act to Regulate Commerce. We have seen that, whatever may be the power of the Commission as to non-administrative controversies under the Act to Regulate Commerce, certainly the question of car supply, or the duty of the carrier to furnish cars, or the obligation of the carrier to pay damages for failing to furnish cars falls outside of the scope of the Commission's authority and within the scope of the authority of the courts. But if mistaken in all these contentions or, in other words, if entirely mistaken

as to the controlling authority of the Tank Car case, we here contend that the Act to Regulate Commerce, creating as it does the Interstate Commerce Commission, gives to that Commission jurisdiction to consider only such questions as are administrative in their nature, or—to state it otherwise—questions which can properly, under the scheme of regulation devised by Congress, be submitted only to an expert body informed by experience and qualified to deal with questions so intricate and technical in their nature that they ought not to be left to the courts to decide.

It would seem to be clear that if there is any such thing as concurrent jurisdiction of the Commission and the courts, the authority for such a view must be found in Section 9 of the Act to Regulate Commerce, that being the section which authorizes an aggrieved shipper to resort either to the Commission or to the courts for the recovery of damages.

This section of the Act to Regulate Commerce was, as is well known, under consideration by this court in the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, in which for the first time this court disallowed and disregarded what might be considered as the surface meaning of this statute, and held that, in order to accomplish the avowed intention of Congress in enacting the statute, it was necessary to hold that as to all expert, administrative and technical questions the jurisdiction of the Interstate Commerce Commission is exclusive. That is to say, that no action can be taken in the courts with reference to these questions until the Interstate Commerce Commission had passed upon them. Through-

out this opinion will be found language indicating that the court felt that the Commission should be limited to the decision of administrative questions or such questions as an expert body would deal with. For instance, this language is used:

> "In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonabel schedule during the period when such schedule was in force."

This view is supported by a long line of subsequent decisions so familiar as not to warrant extended citation.

See

Baltimore & Ohio R. R. Co. v. *Pitcairn Coal Co.*, 215 U. S., 481;

Robinson v. *Baltimore & Ohio R. Co.*, 222 U. S., 506;

United States v. *Pacific & Arctic Company*, 228 U. S., 87;

Pennsylvania R. Co. v. *International Coal Co.*, 230 U. S., 184.

Pennsylvania R. Co. v. *Mitchell Coal & Coke Co.*, 238 U. S., 251;

Morrisdale Coal Co. v. *Pennsylvania R. Co.*, 230 U. S., 304;

Pennsylvania R. Co. v. *Puritan Coal Mining Co., supra.*

In the last cited case will be found a very clear statement of the meaning of the option provision in Section 9. After the decision of the *Abilene* case, there was considerable discussion by the profession and in some of the opinions of the inferior courts as to just what was really meant by that language in Section 9 of the Commerce Act which permitted a shipper to make his complaint either before the Commission or before the courts in a matter involving a claim for damages. It is made clear, however, in the last cited case as to just how this option may arise. Thus it is said:

> "There are several decisions already cited which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and

> unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in Section 9."

Here it is shown that the option mentioned in Section 9 arises when the Commission has made an order within its jurisdiction upon an administrative question. Thereafter, the aggrieved shipper, in whose behalf the order has been made, may continue to pursue the matter before the Commission or he may resort to the courts for redress.

This is further made clear in the case of

> *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662.

In that case a lumber rate had been found to be unreasonable and excessive by as much as 2 cents per hundred pounds. Reparation had been ordered by the Interstate Commerce Commission to certain shippers who called the matter to the Commission's attention. The Phillips Company, however, although affected by the decision, did not file its claim with the Interstate Commerce Commission, but instead brought suit in court for the excessive charges collected. It was argued by the defendants that the sole remedy of the shipper was with the Interstate Commerce Commission. This contention, however, was disallowed by this court, wherein it is said:

> "But, as the plaintiff was not a party before the Commission, the defendants insist that it cannot take advantage of the order that the rate was unjust, so as to be able to maintain the present suit. But the proceeding before the Com-

> mission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public with the result that the order of the Commission would have created a preference in favor of the parties to the record, and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order."

A very clear treatment of the question is found in the case of

National Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65.

In this case the Circuit Court of Appeals of the 7th Circuit considers the meaning and effect of Section 9. The court divides the questions which may be submitted to the Commission into those which are essentially quasi legislative in their nature and those which are essentially quasi judicial in their nature. Questions dealing with rates, discriminations, preferences, etc., calling for a general order affecting the general public are deemed to be quasi legislative. Questions, however, which deal with the payment of damages accruing to individuals who have suffered as a result of unreasonable rates and undue

preferences are considered as being quasi judicial. This language is used:

> "Varying secret rates, unjust discriminations, undue preferences were the evils to be cured. Publicity, uniformity and equality with respect to all matters of rates and practices were the remedies. And a new means was created for administering the remedies, namely, the Commission with its supervisory and regulatory powers. The Commission was added as an instrumentality of the administrative department of the Government, and two distinct classes of powers were conferred upon it—quasi legislative and quasi judicial.
>
> When shippers before the Commission challenge a published rate as unjust and demand the fixing of a just rate, and fail to make a claim or admit they have no claim for damages accrued, they present nothing but matter that is legislative in its nature. * * * When shippers before the Commission challenge a published rate as unjust and demand the fixing of a just rate, and additionally ask a reparation order for damages measured by the excess of the published rate over the declared just rate as applied to their shipments, their additional or secondary demand, considered by itself, presents nothing but matter that is judicial in its nature."

It is fairly clear from these decisions as well as from the very nature of the Interstate Commerce Commission and its functions that if a question is not administrative in its essential character, if it is not one which calls for the exercise of the informed and expert opinion of the Commission, there can be no excuse for the reference of such a matter to the Commission and no room for the exercise of the Commission's powers. True it is that if the Commission obtains jurisdiction over any question by

reason of its administrative nature, it may go ahead and give the shipper complete relief by inquiring into the question of damages and awarding reparation if damages have resulted. But clearly the shippers' recourse is to the courts if the damage is not such as grows out of any violation by the carrier of its duty with respect to reasonable and non-discriminatory rates, regulations and practices. The Commission can have no concern with the general duties of the carriers under the common law, whereby shippers are protected in the almost numberless transactions which occur daily as between shipper and carrier.

One of the duties of a carrier is to furnish cars. This is not different from the duty to operate trains, to furnish station facilities, to accord the public courteous treatment on the part of its employes, and a hundred and one other things which will readily suggest themselves. The Commission does not exist for the purpose of enforcing all these obligations. If it be said, as the Commission has said in this case, that no decision of the courts can be found denying the concurrent jurisdiction here contended for by the appellant, the answer may be that there is concurrent jurisdiction in the matter of awarding damages, but only in those cases which must first be submitted to the Commission for the determination of administrative questions. If no decisions can be found denying such concurrent jurisdiction where there are no administrative questions, the reason is doubtless that the contention of the appellee here is so obviously correct that no court has found it necessary to so declare it.

However, some light on the subject can be found in the case of

L. & N. R. R. Co. v. *Cook Brg. Co.*, 223 U. S. 70.

In that case the carrier refused to receive and transport certain shipments of intoxicating liquor tendered at Evansville, Indiana, for transportation into Kentucky. The railroad company's excuse for refusing to receive these shipments was that the importation of intoxicants into certain Kentucky territory was prohibited by the laws of Kentucky. A proceeding was brought in the court to compel the railroad company to accept these shipments. The defendant carrier undertook to defend upon the ground that the matter should first be submitted to the Interstate Commerce Commission. Mr. Justice LURTON, in passing upon this contention, uses this language:

> "Why should the Brewing Company have made complaint to the Commission? What relief could it afford? There was no tariff question; there was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points; there was no claim that the commodities tendered were inherently dangerous to transport or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. * * * There was no discrimination if the law was valid, and the result must turn not upon any administrative question or questions of fact within the scope of the power of the Commission but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal and one not competent for the Commission as a purely administrative body."

It will be seen from this language that the court holds in just so many words that no question is competent for the Commission to consider unless it be an administrative question.

Questions relating to jurisdiction.

It was earnestly contended by the Interstate Commerce Commission and by the United States, in the court below, and doubtless the same arguments will be urged here, that the United States District Court for the Eastern District of Illinois had no jurisdiction to entertain the bill filed in this case. The contention was raised by motions to dismiss filed on behalf both of the United States and of the Interstate Commerce Commission and the same points were raised in the answer of the Interstate Commerce Commission. (Tr., 46-49.) These motions were by the court overruled. The contention of the appellants in this respect is twofold: (1st) that the U. S. District Court has no jurisdiction for the reason that the bill does not present an attack upon any "order" of the Interstate Commerce Commission; (2d) that a bill for injunction will not lie in any court to restrain the Interstate Commerce Commission from holding a hearing upon the question of awarding damages, even though the Commission has no jurisdiction of the subject-matter.

It may be said that the first of these contentions rests upon the language of the act creating the Commerce Court. (36 Stat. L., 1148.)

It will be remembered that the proceeding in this case is by virtue of the provisions of the so-called "District Court Jurisdiction Act," approved Octo-

ber 22, 1913. (38 Stat. L., 219.) That statute provides that the several district courts shall have the same jurisdiction with respect to Interstate Commerce orders and proceedings as was formerly vested in the Commerce Court. We must look, therefore, to the Commerce Court Act to determine precisely what jurisdiction inheres in the District Court.

Under the provisions of the Commerce Court Act, jurisdiction is conferred upon the courts of all cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. The point is made by the Government and by the Interstate Commerce Commission in this case that the order of the Interstate Commerce Commission setting down this case for further hearing upon the question of reparation is not such an order as could have been enjoined in the Commerce Court or such an order as can now be enjoined in the U. S. District Court. The order in question is shown at page four of the transcript. It is in the following words and figures:

> "No. 6128—*Vulcan Coal and Mining Company* v. *Illinois Central Railroad Company.* No. 6128 Sub-No. 1—*St. Louis-Coulterville Coal Company* v. *Illinois Central Railroad Company.* No. 6128 Sub-No. 2—*Groom Coal Company* v. *Illinois Central Railroad Company.*
>
> The above entitled cases are assigned for hearing October 1, 1915, at ten o'clock A. M., at Hotel Jefferson, St. Louis, Missouri, before Examiner Wilson.
>
> By the Commission.
>
> (Signed) GEORGE B. MCGINTY,
> *Secretary.*"

The significance and effect of this order can only be understood by a careful examination of the opin-

ion of the Commission disposing of the question of jurisdiction and discussing the legal obligation of the carrier and the rights of the complaining shippers.

By reference to the Commission's report, it will be seen that on the hearing of this case testimony was offered showing the number of cars demanded and the number of cars furnished for the period in controversy. It further appears that the Railroad Company at such hearing offered testimony in extenuation of its alleged failure to furnish all the cars demanded. The report shows that the defendant produced testimony as to the number of cars it had purchased since the year 1911; as to the number of coal cars it owned per mile of line in comparison with the number owned by other important coal-carrying roads; that the Illinois Central served a large number of small mines thereby making the problem of car distribution difficult; that a great deal of the coal went beyond the line of the Illinois Central, thereby depriving the Railroad Company of the use of its cars for a considerable period; that the weather during the time complained of was extraordinarily severe; and that the normal activities of the Railroad were greatly disturbed by a strike which occurred on its line in the Autumn of 1911. The Commission, however, rejected all these defenses and held that the excuses tendered by the Company were not sufficient. This language is used by the Commission:

> "While the testimony offered by defendant explains to some extent its failure to furnish cars during the period specified, it does not in our opinion present a complete excuse. It may safely be said that at least in so far as the car supply upon the St. Louis Division is concerned,

defendant did not at all times meet the requirements of the act. The figures submitted by defendant's General Superintendent of Transportation show that, during certain months of the car shortage periods, the car supply on the St. Louis Division was as low as 33% of the cars demanded. However, from this it does not follow that complainants were damaged by the carrier. Even though the car supply for the entire division upon which their mines are located was inadequate, the supply at their particular mines may have been adequate to meet all reasonable demands which they were in a position to make. At the hearing, complainants and defendant agreed not to go into the matter of the amount of damages to be recovered. The question of whether or not the car supply was legally adequate at these particular mines is so closely bound up with the question of the amount of damages that we have decided to leave both questions for subsequent hearing."

From this language it clearly appears that the Commission made an adjudication that the Illinois Central Railroad Company had failed in its duty to provide its mines with a legally sufficient car supply, and the only question left for consideration is whether it failed in its duty toward these particular mines, and, if so, what amount of damage should be awarded by the Commission. In other words, there can be little doubt that the Commission had it in mind to award reparation in this case in some amount, and the carrier, at the time it filed its bill in the U. S. District Court, was confronted with the practical certainty that there would be entered up against it three separate and distinct judgments—one in favor of each of the complainant coal companies, whereby reparation in a considerable sum would be awarded.

The effect of this order was to require the Railroad Company to appear at St. Louis on the day stated, with its witnesses and its counsel. Testimony would have to be taken upon a most complicated and intricate question, the accounts of the coal companies would have to be scrutinized carefully, such testimony as the Railroad Company could offer in defense would have been given in the light of what amounted to a previous declaration of the Commission that at the end of this proceeding there would be judgments entered against the Railroad Company. Thereafter, the Railroad Company would be compelled to defend in court these three several suits all depending upon precisely the same facts and involving the same principle of law. In such cases a finding of the Commission would be prima facie evidence not only of the facts found by the Commission but also of the ultimate fact of liability.

Meeker v. *Lehigh Valley R. Co.*, 236 U. S. 412.

Mills v. *Lehigh Valley R. Co.*, 238 U. S. 473.

All these expensive and troublesome proceedings would go on in a matter in which the Commission had no jurisdiction.

It is our contention upon the first proposition made by the Government, that the order of the Interstate Commerce Commission setting this case down for a further hearing was such an order as could be attacked in the courts under the Commerce Court Act. It was contended in the court below that the term "order," as used in the act conferring jurisdiction upon the court, meant an order altogether different from the one here under consideration. It was contended that the purpose of Congress was to

give to the courts jurisdiction to set aside only such orders of the Commission as command a party to do or refrain from doing something. In support of this contention reference is made to the case of

Proctor & Gamble Co. v. *United States*, 225 U. S. 282.

The decision in question, however, gives no support to the theory.

The *Proctor & Gamble* case was one in which the court found it necessary to hold that the courts had jurisdiction to consider only affirmative orders of the Commission. In that case, as the court will remember, the order of the Commission denied the relief sought by the shipper. It laid no injunction whatever of an affirmative character upon the carriers. The order of the Commission called for no action by the carriers, nor, indeed, did it call for any affirmative action by anybody. It was upon this view that this court held that there was no jurisdiction in the Commerce Court to review these negative orders.

But the order here attacked does call for affirmative action. Taken in connection with the established practice of the Commission, it amounts to a direction that all the parties in interest should appear in St. Louis on a certain day, and there give evidence upon the question of the amount of damages sustained by the complainant in a proceeding which was clearly beyond the power of the Commission to interfere with. It cannot be said that this was a merely negative order. It was an order which commanded the Railroad Company to expend money and effort and which would inevitably lead to an award of

reparation which would, ultimately, have to be faced in the courts. In other words, the order was not unlike in its effect the order entered by the Commission in the matter of relief from the provisions of the long and short haul clause of the Fourth Section of the Act, which order was characterized as affirmative in its nature and one which could be attacked by the courts.

Intermountain Rate Case, 234 U. S. 476.

It is said, however, that the order, if an order at all, is one having to do with the payment of money by the carrier to individual shippers, and that the Commerce Court Act has reference to such orders as are of a public nature, affecting the general interests of shippers and cannot be applied to orders pertaining to the payment of money. This contention is completely destroyed by the authority of the case of

Southern Ry. Co. v. *United States*, 193 Fed. 664.

In that case, which was before the Commerce Court, it was contended that a carrier could not file a suit to set aside an award of the Commission granting reparation. It appears in this case that the parties in whose favor the reparation award was made were not joined in the suit. The point was distinctly made by the Government in that case that no suit would lie in the Commerce Court to set aside an order of the Interstate Commerce Commission awarding reparation. This point was considered by the court, and in fact it was the only point decided. The court, however, overruled the contention, using this language:

"The language which defines an order which may be affected by decree of this court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a Circuit Court formerly possessed jurisdiction to annul, set aside or suspend. And that prior to June 18, 1910, the Circuit Courts had jurisdiction is evident, for the language of Section 16 of the Interstate Commerce Act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend any order of the Commission. We cannot read into the clause which confers jurisdiction upon this court words of limitation other than those which formerly circumscribed the powers of the Circuit Courts, nor can we except from the described kinds of cases where injunctions, annulment, or suspension may be had, orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the court to go beyond the plain expressions of the Legislature, prevents the court from holding otherwise."

Further along in the opinion the court discusses the contention that jurisdiction would not lie to annul an order of the Commission because the carriers could, in defending a suit in the courts to enforce a reparation award, make all the defenses which they could make in the suit to set aside the order. The distinction is drawn between a suit in the Commerce Court by the railroad companies and a suit by the shippers in the Circuit Court. The court, in disposing of this contention, uses this language:

"We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the pay-

ment of money, it could not have been intended to authorize us to annul such an order; and it is said that when the Circuit Court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission. The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and, on the other hand, an express grant to this court of exclusive authority to hear and decide a petition brought to annul or enjoin an order of the Commission. No suit having for its purpose the annulling of an order for the payment of money is brought in the Circuit Court, and none can be; the jurisdiction of this court being exclusive in actions of that kind. The case in the Circuit Court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the order upon which plaintiff bases his action; but we need not dwell upon what questions may be presented in the Circuit Court, for we have no jurisdiction over them. It is plain, however, that if such a defense is sustained in the Circuit Court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced. In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than

> they do under any system where separation of law and equity obtains, and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission."

It would therefore seem to be settled law that the U. S. District Court has jurisdiction of a suit brought by a carrier to enjoin and set aside an order of the Commission awarding reparation. It is true that no order of reparation has been made in this case, but the order here attacked will inevitably lead to such an award, and, furthermore, it calls for action on the part of a carrier in the way of making defenses, all of which will lead to the expenditure of considerable sums and to the necessity of defending a very large number of cases in the courts.

As pointed out by the Commerce Court, the language of the statute conferring jurisdiction is very broad. It gives the court authority to set aside *any* order of the Commission. There is no effort made to distinguish between an order of this kind and an order in a suit not involving reparation. It was manifestly the purpose of Congress in creating the Commerce Court to establish a tribunal which would have general jurisdiction over the proceedings of the Interstate Commerce Commission and wherein shippers and carriers could test the validity of any decision by the Commission which calls for affirmative action by the party conceiving himself to be aggrieved. Here was a case brought before the Commission in a matter entirely beyond its jurisdiction. We say this for the reason that, if the Commission

had jurisdiction, the whole proceeding must fail and this branch of the argument will never be reached by the court. The assumption is that the court was absolutely without jurisdiction. We say, therefore, that here was a case in which the Commission had no jurisdiction, brought by a shipper for the sole purpose of recovering damages. The jurisdiction of the Commission was challenged and this question was elaborately briefed and argued before that body. At the same time and upon the same record, there was presented the question of whether the complainant before the Commission had in fact suffered legal damage as a result of any action by the carrier. Both these questions were settled by the Commission. It held in an exhaustive opinion that it had jurisdiction, and held further upon the facts found in the record that legal damage had resulted to the shipper. The only question left unsettled was the question of amount, and this it was proceeding to ascertain. The Commission, by the order here under review, set the matter down for a further hearing upon this question. If it had no jurisdiction, it had no right to make such an order in the case. There can be no doubt that the notice set out by the Commission was in effect an order. It was a command addressed to the carrier and to the shipper that they should appear on a day certain and proceed with the case.

It may be suggested by the Government and by the Interstate Commerce Commission that the carrier could have ignored this notice or order; could have remained away from the hearing and permitted judgment to be entered as by default. Then it is suggested that if the Commission had not jurisdiction, such an order would be void and the carrier

could make its proper defense in the court when sued upon the reparation award. We say, however, that the carrier cannot be forced to run such a risk. The law does not contemplate that the carrier shall be forced to make so dangerous an election. It is out of the question to assume that this Railroad Company could afford to withhold its defenses before the Commission, relying alone upon the contention that the Commission was without jurisdiction. If, perchance, it should be ruled finally that jurisdiction existed in the Commission, the result would be disastrous, since it would mean that the entire amount claimed would have to be paid, although much of it might be unjust and not susceptible of being legally proved.

Furthermore, it is clear that a court of equity, such as the one from whose decree this appeal is prosecuted, would have jurisdiction upon familiar equitable grounds to restrain an administrative board, such as the Interstate Commerce Commission, from proceeding in this matter—which lies entirely outside of its jurisdiction. Here is a tribunal created by statute for the purpose of carrying out the will of Congress within a limited field in matters expressly committed to its charge, with no general jurisdiction whatever. Under these circumstances, it is perfectly well settled that, when a tribunal of this character undertakes to handle matters not committed to its charge, its activities may be restrained by a court of equity so that persons with whom it undertakes to deal may not be subjected to the expense and inconvenience of defending cases with which it has no power to concern itself. This phase of the matter, however, can best be developed in con-

nection with the argument upon the second branch of the Government's contention—that is to say, the argument that an injunction will not lie to restrain an administrative body from making an order which is essentially interlocutory and not final in its nature. We will briefly, therefore, discuss that phase of the matter.

The argument is that, even assuming that the Interstate Commerce Commission was acting without jurisdiction, the court acted prematurely in restraining its activities at the particular stage at which the court acted in this case. It is said that the Railroad Company had a complete and adequate remedy at law in that it should have attended the hearing at St. Louis, made what defense it could before the Commission and should have permitted the Commission to go on and make its award of reparation. It is said that, thereupon, the shipper would have been compelled to bring suit in either a state or a Federal court to enforce the award of reparation and that the carrier could have made all its defenses in such a proceeding. In other words, it is argued that, while it is true that the Commission had no jurisdiction whatever of the subject-matter, yet it was the duty of the Railroad Company to submit itself to its orders until the proceedings reached a final stage, and make its defense there; that it is not to be tolerated that the court should restrain such an administrative body unless the proceedings before that body have culminated in a final order.

There can be no dissent from the proposition that courts of equity have jurisdiction to prevent illegal or improper acts on the part of administrative bodies when such administrative bodies seek to act under

a statute which is unconstitutional or when they have exceeded their jurisdiction.

Farmers' Loan &c. Co. v. *Stone*, 20 Fed. 270.

Louisville etc. Ry. Co. v. *Tennessee R. R. Commission*, 19 Fed. 679.

Mobile etc. R. R. Co. v. *Sessions*, 28 Fed. 592.

33 Cyc. 53.

In

Union Pacific Railroad Company v. *Alexander*, 113 Fed. 347,

the question was raised as to the jurisdiction of equity to enjoin a taxing board from assessing the property of complainants for taxation. It was contended in defense of the action that there was an adequate remedy at law and that the final action of the Board could be resisted by the property owners. The court, however, thus ruled:

> "The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened action of the defendants, and this is a judicial inquiry to see whether they have authority for their action, whether the law upon which they rely is valid and constitutional or sufficient to justify the action which they are taking. It was insisted at the argument that the complainants had an adequate remedy at law, and therefore a court of equity had no jurisdiction. The rule, as I understand it, is that the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. Within this rule I think the bill states a case of equitable cognizance, and the conclusion reached is that the court has jurisdiction."

In the case of *Hart* v. *Smith*, 58 L. R. A. 949, at page 955 of the opinion this language is used:

> "Although such board is composed of men who, for the most part, otherwise occupy high official station, and although such board performs duties of very great importance to the state, yet such tribunal is nevertheless one of granted powers; and, if it acts without jurisdiction, the courts have the power to arrest the consequences of its acts. In *State Bd. Tax Comrs.* v. *Holliday*, 150 Ind. 216, 42 L. R. A. 826, 49 N. E. 14, this court sustained a proceeding to enjoin the state board from listing and valuing the life insurance policies for taxation that were held by the appellees in said action. In *Semour* v. *Ruth*, 140 Ind. 318, 39 N. E. 946, 947, this court, in answer to the claim that the appellee therein was precluded by the action of a county board of review, said: 'When we have found that the property was not within the jurisdiction of the state, we have found the absence of an element necessary to the validity of the board's action, and in such case the action is void, and may be attacked collaterally.' The proposition that a court of equity will enjoin when there is no jurisdiction, finds support in the authorities without this state. *Santa Clara County* v. *Southern P. R. Co.*, 118 U. S. 493, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1132; *Central P. R. Co.* v. *California*, 162 U. S. 91, 114, 40 L. Ed. 903, 911; 16 Sup. Ct. Rep. 766; *Wade* v. *Craven County*, 74 N. C. 81; *St. Mary's Gas Co.* v. *Elk County*, 191 Pa. 458, 43 Atl. 321; *Keokuk & H. Bridge Co.* v. *People ex rel. County Treasurer*, 161 Ill. 132, 43 N. E. 691; *Maxwell* v. *People ex rel. Freise*, 189 Ill. 546, 59 N. E. 1101; *Montis* v. *McQuiston*, 107 Iowa 651, 78 N. W. 704; *Poe* v. *Howell*, (N. M.) 67 Pac. 62; *State* v. *Ernst* (Nev.), 65 Pac. 7."

In the familiar case of

Fargo v. *Hart*, 193 U. S. 490,

the point was made that a court of equity had no

jurisdiction to enjoin a state officer of Indiana from certifying an assessment to the county auditors scattered throughout the state. In disposing of the point, Mr. Justice HOLMES uses this language:

> "The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without jurisdiction, according to the decision of the Supreme Court of Indiana. *Hart* v. *Smith*, 159 Ind. 182. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. *State Railroad Tax Case*, 92 U. S. 585. But it was recognized in the passage just quoted from *The People's National Bank* v. *Marye*, that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194. It avoids the necessity of suits against the officers of each of the counties of the State, and we are of opinion that the bill may be maintained. *Union Pacific Ry.* v. *Cheyenne*, 113 U. S. 516; *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Board of Public Works*, 172 U. S. 32."

In

> *First National Bank* v. *Albright*, 208 U. S. 548,

there was involved the quesiton of the power of a court of equity to interfere with a taxing board. This court held that no such interference could be had in that particular case for the reason that there was no doubt that the taxing board had general jurisdiction over the subject matter. It was said by this court that it could not be assumed in advance that the taxing authorities would dispose of the matter illegally and improperly, and that the complaining tax-payers should wait until a decision had been

made. But it is plainly intimated in this opinion that, if the taxing authorities had been wholly without jurisdiction to fix any tax, a writ of injunction would lie. The court uses this language:

> "But we agree with the Supreme Court of the Territory that the time for deciding these and other questions has not come. The acceptance of what was admitted to be due created no estoppel to demand more. There was no such precise averments in the complaint as would warrant our assuming that no assessment could be made for a further amount, still less that none in any form could be made, when there is no valid one upon the books. We cannot tell, and much more positive averments of intent than those before us would not warrant a court in prejudging what the assessing officer will do. It is not for a court to stop an officer of this kind from performing his statutory duty for fear he should perform it wrongly."

The inference here is very strong that if it appeared that the Board was without any authority whatever to assess taxes in any amount, or for any purpose, the court would be quick to enjoin any action looking toward such assessment.

It may be said, however, that this suit cannot be maintained upon the authority of such cases as

McChord v. *L. & N. R. R. Co.*, 183 U. S. 483.

In that case the court held that the action of the Kentucky Railroad Commission could not be restrained in the matter of passing upon a general schedule of rates, but this decision was upon the express ground that the proposed action of the Commission was legislative in its character. It is well enough settled that courts have no power to restrain boards created by the laws of the state from the exercise of acts which may be said to be legislative. In

the *McChord* case there was no question as to the general rule. The court held that the orders of the Kentucky Commission were not self-executing and that it would be time enough to seek an injunction when the rates had actually been established by the Commission and some judicial proceeding was about to be instituted by the Commission to enforce the schedule of rates. The court was at pains to point out that the Commission, in fixing a schedule of rates, would act in a legislative capacity and that this legislative action ought not to be interfered with by the courts. The doctrine was that, when the Kentucky Commission ceased to act legislatively and began to act judicially, that is to say, began the process of enforcing its orders in the courts, injunction would lie provided the carriers could show that the Commission had acted beyond its authority.

Now, it is well settled that the Interstate Commerce Commission, in considering a question of reparation, and in making all orders with reference to reparation, is acting not in a legislative capacity but always in a judicial capacity. That is to say, the Interstate Commerce Commission acts legislatively in all matters of a general nature affecting the public, such as passing upon rates, practices, etc., either upon a complaint of unreasonableness or of discrimination. It acts, however, quasi judicially in all questions affecting the payment of money. See upon this point the very clear opinion of the Circuit Court of Appeals of the 7th Circuit in

National Pole Stock Co. v. *C. & N. W. R. R. Co., supra.*

We have, heretofore, in another connection, quoted somewhat from this opinion, in which there is used

language which distinguishes between the quasi legislative powers of the Commission and the quasi judicial powers of the Commission. The holding in that case is that the Commission acts quasi judicially in all matters affecting reparation.

See also to the same effect in principle the case of
Phillips v. *Grand Trunk Western Ry. Co.*, *supra.*

See also the very recent case of
Hillsdale Coal & Coke Co. v. *Pennsylvania R. Co.*, 237 Fed. 272,
in which the District Court for the Eastern District of Pennsylvania draws a clear distinction between actions of the Commission which may be considered administrative and actions which may be considered juridical.

Of the same nature as the *McChord* case is the case of
New Orleans Water Co. v. *City of New Orleans*, 164 U. S. 471,
wherein the court says:

> "The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates."

But it will be observed that here the court is again dealing with an effort to control or prevent legislative action by a municipal body having, undoubtedly, the right to legislate in a general way with reference to many matters of concern to the inhabitants of the city. The question here, however, is as to whether, upon familiar principles, a court of equity

may interfere to prevent the Commission from harassing and annoying the railroad company and subjecting it to the necessity of defending a multiplicity of suits in a matter entirely beyond its control and with which under the statute it has nothing whatever to do.

The well-known doctrine of multiplicity of suits here finds ready application. It is clear that if the Interstate Commerce Commission is to go on, the Railroad Company will be compelled to defend at least three cases, since that number is here involved. But that is not all. If the Commission makes a finding as to the legal insufficiency of the number of cars furnished these complainants, that finding will hold good and support actions at law by all coal operators in the same territory and operating under the same conditions; for it is well settled by this court in the case of *Phillips Co.* v. *Grand Trunk Western Ry. Co., supra,* that when the administrative question is once settled, suits for damages may be brought in the courts by any shipper affected by the general finding of the Commission. It cannot be said, therefore, that the Railroad Company will be called upon to defend only three suits at law based on awards before the Commission. These three may be increased to hundreds before the matter is over.

Now courts of equity have been ready enough to interpose their power to prevent the bringing and prosecution of unconscionable actions at law. It would serve no useful purpose to review the very familiar doctrine which upholds the jurisdiction of a court of equity to prevent a multiplicity of suits. It may be sufficient to call attention to the leading case of

Hale v. *Allinson,* 188 U. S. 56.

The doctrine which controls the Federal courts is thus stated:

> "Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

In

Bitterman v. *L. & N. R. R. Co.*, 207 U. S. 205,

the court sustained an injunction against ticket scalpers or brokers on the ground that the carrier ought not to be required to prosecute a separate suit against each one, the principle of law being the same in all these cases and the facts substantially identical.

In

Jordan v. *Western Union Telegraph Co.*, 69 Kans. 140,

the court applied this doctrine to prevent a number of useless suits against the Western Union Telegraph Company, the purpose of which was to collect penalties which the court adjudged not collectible.

In

Southern Pacific Ry. Co. v. *Robinson*, 132 Calif. 408,

the jurisdiction was successfully invoked by the rail-

road company to prevent suits by persons who had assumed the role of travelers for the sole purpose of accumulating penalties against the railroad company.

In

Illinois Central R. R. Co. v. *Baker*, 155 Ky. 512,

the court applied this doctrine in such a way as to enjoin the bringing of a large number of suits by coal miners for failing to furnish cars to a coal mine, thereby, as alleged, preventing these miners from earning wages. In that case the court used this language:

> "We think there is a broad distinction between invoking the jurisdiction of a court of equity to prevent a multiplicity of suits by different plaintiffs each having a separate, distinct meritorious cause of action, and invoking this jurisdiction to prevent a multiplicity of suits by plaintiffs who have not a legally enforceable demand against the defendant. And so if these coal diggers have not a meritorious demand against the defendant railroad company, there are many reasons why the jurisdiction of a court of equity should be invoked to require all their suits to be heard and determined in one action, that could not be invoked if each of them had a meritorious claim. If no one of the plaintiffs in the quarterly court is entitled to recover any amount against the defendant company in any of these suits, it would be an extraordinary hardship on the defendant to put it to the expense, inconvenience and cost of defending this multitude of suits in the quarterly court, and be an intolerable condition of affairs, if, after defending them to the best of its ability, a binding and unreviewable judgment should be rendered against it in each case for the amount claimed and to be compelled to pay the large sum that would be required to satisfy these various judgments,

without an opportunity to have its rights determined by a court speaking with more authority than the quarterly court."

Again, the court says:

"Having in mind the distinction that should be observed between the assertion of valid and groundless claims, we think that when a large number of cases arising out of the same transaction or resting on the same common ground, having been instituted by different plaintiffs against the same defendant, and none of the plaintiffs have a legally meritorious or enforceable demand against the defendant, the jurisdiction of a court of equity may be invoked to the end that the rights of the parties, plaintiffs and defendant, may be heard and determined in one proceeding, thereby saving the defendant from the unjust burden of defending a number of separate suits. In this class of cases the exercise of the equitable jurisdiction referred to does not prejudice any substantial rights of the plaintiffs, because they have no substantial rights that can be prejudiced. It does not deny to them the right to seek lawful redress in any court of justice they may select, having jurisdiction to hear and determine the case, because they have not suffered any injury entitling them to have redress. It does not take away from them the right to have meritorious relief in a court established for the purpose of giving relief to parties deserving of it, because they have no right to the relief sought."

We think it unnecessary to argue the matter further. Let us suppose that the Interstate Commerce Commission were to issue an order commanding this Railroad Company to appear before it and answer to a charge of having injured a passenger in a wreck. Would it be said that the Railroad Company must submit to the jurisdiction to the extent of taking its witnesses to the place of hearing, employing

counsel, submitting to an award of reparation, and could take no steps to stop this idle and vain procedure? Would it be said that it could be called upon from time to time to defend actions of this character and could not make its real defenses or challenge the jurisdiction until after there had been an award of reparation by the Commission and a suit to enforce this award in the courts? Or, let us suppose, to use an illustration used by the court below in its oral opinion, that the Commission should cite some individual to appear before it to defend himself upon a charge of homicide. Would it be said that the person so cited must employ counsel, defend this action and wait until the Commission had pronounced its judgment before any steps could be taken to challenge its authority? To propound these questions is to answer them.

It may be said generally that the purpose of Congress in creating the Commerce Court and the purpose of Congress in conferring the jurisdiction formerly given to the Commerce Court upon the U. S. District Court was to furnish a tribunal wherein in a practical and sensible way persons having business with the Commission may secure authoritative decisions as to the extent of the Commission's power. The District Court, feeling that the Commission was entirely without jurisdiction, concluded that the carrier should not be compelled to go through the vain performance of making a defense in a matter which should be before the courts and not before the Commission, and granted the injunction from which this appeal is prosecuted. No good purpose certainly can be accomplished by reversing this decree, provided, of course, this court is convinced

that the Commission is without jurisdiction. Probably a finding by this court to that effect would deter the Commission from proceeding further in this case. If, however, the principal question here involved, that is to say, the question of the Commission's authority, is not settled but the case is reversed because of the belief that the carrier should have made its defense at the conclusion of the proceeding before the Commission, manifestly this same, or some other similar, procedure must be gone through again to the infinite annoyance and to the great expense of all concerned.

We submit, therefore, that the decree of the learned District Court should be affirmed.

Respectfully submitted,

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